Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 60

JAMES RUSSELL ROBINSON, JOSEPH PRICE PERKINS, MARVIN EDISON ROBINSON, THOMAS VAWN ROLAND, JAMES H. LANE, THOMAS WALTER GAITHER, BARRY M. COHEN, ANGELINE E. BUTLER, HENRY PRINGLE, BERNARD LAFAYETTE, OLIVER WILLIAM ST. PEE, LEON EVERETTE BAILEY, DOROTHY R. MILLER, PATRICIA STEPHENS, PRICILLA STEPHENS, ALICE M. PARHAM, ROBERT PAUL YOUNG, and DR. CARL ELLIOTT YAEGER, JR.,

Appellants,

—vs—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF THE APPELLEE IN REPLY TO THE SUPPLEMENTAL BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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PRELIMINARY STATEMENT

Appellee has no knowledge of the source of the questions argued in the supplemental brief for the United States as amicus curiae. Certainly they cannot be said

to have their origin in this Court's request that a supplemental brief be filed treating of the broader constitutional "question". Even indulging the solicitor in his right to at least a measure of literary latitude, it does seem that the issue upon which this Court requested their brief either is or shoud be as follows:

> MAY A PRIVATE CITIZEN WHO ELECTS TO SCREEN PERSONS WHOM HE WILL HAVE ON HIS PREMISES UPON THE ARBITRARY BASIS OF RACE ALONE CALL UPON POLICE OFFICERS TO ENFORCE THAT RIGHT?

This may be broken down into two (2) components without doing violence either to this Court's request or to the solicitor's brief.

> (A) DOES A PRIVATE CITIZEN HAVE THE RIGHT TO SCREEN PERSONS WHOM HE WILL HAVE ON HIS PREMISES UPON THE ARBITRARY BASIS OF RACE ALONE?
> (B) IF HE DOES, MAY HE CALL UPON POLICE OFFICERS TO ENFORCE THAT RIGHT?

Assuming, without deciding, that the question is properly stated and is capable of being correctly broken-down as set out above, the following observations seem, to the appellee, to be appropriate to this Court's reaching a conclusion anent the matter in issue.

ARGUMENT

Approximately eight-one (81) years ago this very tribunal in **The Civil Rights Cases,** 109 U.S. 3, 27 L.Ed. 835, 3 S. Ct. 18 (1883), observed; in condemning the legislative attempt of the National Congress, that private rights to discriminate could not be made the object of that legislative body's enactments.

Certainly it would be foolish to suggest that this Court would have made the pronouncement which it did if in fact there did not exist a private right to discriminate. The entire opinion in **The Civil Rights Cases,** supra, woud have no real meaning but for the salient difference between private discrimination and state discrimination.

It is manifestly well-settled that owners and/or operators of private enterprises including, of course, restaurants, are under no obligation to do business with any party simply because that party so wishes—they may select their invitees and/or clientele **sans** regard to rhyme or reason and, if the Court please, based upon color if that be their wish. **Williams v. Howard Johnson's Restaurant,** 268 F. 2d 845 (4th Cir.); **Slack v. Atlantic White Tower System, Inc.,** 181 F. Supp. 124, aff. 284 F. 2d 746; **Griffin v. Collins,** 187 F. Supp. 149; **Madden v. Queens County Jockey Club,** 72 N.E. 2d 697 (New York), cert. denied, 332 U.S. 761; **Terrell Wells Swimming Pool v. Rodriquez,** 182 S.W. 2d 824 (Texas); **Younger v. Judah,** 19 S.W. 1109 (Missouri); **Goff v. Savage,** 210 P. 374 (Washington); **De La Ysla v. Publix Theatres Corporation,** 26 P. 2d

818 (Utah); **Horn v. Illinois Central Railroad,** 64 N.E. 2d 574 (Illinois); **Coleman v. Middlestaff,** 305 P. 2d 1020 (California); **Fletcher v. Coney Island,** 136 N.E. 2d 344 (Ohio); **Alpaugh v. Wolverton,** 36 S.E. 2d 906 (Virginia); **Greenfeld v. Maryland Jockey Club,** 190 Md. 96; **Good Citizens Association v. Board,** 217 MD. 129; **Drews v. State,** 224 Md. 186; **Garfine v. Monmouth Park Jockey Club,** 148 A. 2d 1 (N.J.); and **State v. Clyburn,** 101 S.E. 2d 295 (N.C.).

Even this very Court in **Boyton v. Virginia,** 264 U.S. 454, 5 L.Ed. 2d 206, 81 S. Ct. 182 (1960), clearly recognized the applicability and validity of the foregoing principles when it concluded that every time a trans-state bus stops at a wholly independent roadside restaurant not even the Interstate Commerce Act required that eatery to provide service in harmony with its provisions. **In point of fact this Court has even refused to hold that where a privately owned restaurant is involved; in the absence of the general tax paying public's ownership of or interest in the facility, in interstate commerce that it will extend federal protection by judicial fiat against racial discrimination on the basis of the Fourteenth Amendment. Burton v. Wilmington Parking Authority,** 365 U.S. 715, 6 L. Ed. 2d. 46, 81 S. Ct. 856 (1961); **Boyton v. Virginia,** supra.

Such recent pronouncements as these can certainly be considered no less than a judicial reaffirmance of the long-established law that the owner of private property may be arbitrary and capricious in his choice of invitees, not withstanding the Fourteenth Amendment; and that said amendment "erects no shield

against merely private conduct, however discriminatory or wrongful." **Shelley v. Kraemer,** 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948), and **Terminal Taxicab Company v. Kutz,** 241 U.S. 252.

The net effect of the opinions in the cases cited above, is perhaps best stated in the case of **Griffin v. Collins,** supra, where the court said:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws."

In the face of these most compelling judicial acknowledgments of the existence of a private right to discriminate, appellee sadly notes multiple conclusions in the solicitor's brief that in fact such right does not exist and if it does, it should not. To the possible assertion that they only mean to say that the state should not encourage private discrimination, we would of course defer, if that were all. But, it is not.

The positions assumed in the solicitor's brief virtually require a series of impossible conclusions some of which may be summed up as follows:

That the establishment in this case (Shell City Restaurant) is as public as the streets of a city, its parks, sidewalks, structures and other thoroughfares.

Because it is an establishment of this nature, it is not to be considered in the same light as would be the right of an individual to select the people whom he will permit to enter his home.

The source from which this grand conclusion sprang is one which all the legal maps in the world could not help to locate. A private business man merely announces to the public that they are invited to deal with him in his establishment. He gives no assurances that he will deal with them, however contrary his past performances might lead one to believe. He may throw them all out if it suits his fancy or deny entry to those whom he pleases. That is basic contract law which even the most militant of advocates would not gainsay.

The streets of a city are owned by every resident—through the tax structure by which he must abide.

The parks of a city are owned by every resident—through the tax structure by which he must abide.

The sidewalks of a city are owned by every resident—through the tax structure by which he must abide.

The structures and thoroughfares of a city are owned by every resident—through the tax structure by which he must abide.

It is here that the solicitor elects to depart from the above and, sweeping it aside as though it were naught, replaces it with a cavalier announcement that because some members of the body public have literally never had to deal with such a proprietor, it is absurd to say that it is not public. The distinction should be obvious; while the private businessman garners his customers from the general public, he does not, simply because of that, surrender his right not to do business with any individual for any reason that may suit him. We think it axiomatic that one's private right in this regard has been held inviolate for all these years because to hold otherwise would be to destroy the very structure of our republic. If we are to pride ourselves on the net result of private endeavor, would it not be folly to suggest that the private endeavor, if it ever existed, should now be forever intered? We think so.

The solicitor seeks to buttress his conclusion that this was not simply private discrimination but rather state discrimination because even if it was in a measure private, it was engendered by a long policy of the State of Florida, which policy actively sponsored and encouraged such action either by legislative enactments or, of all things, community sentiment. The solicitor even reaches into the dim recesses of the past as though to find there what he knows he cannot find here.

We note that of all the cases relied on by the solicitor in support of his position only that of **Shelley v. Krae-**

mer, supra, bears even a remote connection with the issue at hand. Appellee notes now as it did in its initial brief on the merits of this case that the salient factor in Shelley was that the courts of Missouri were the implementing factor in judicially requiring the discrimination in question. In short, this Court's decision in Shelley did no more than insure the purchaser that once he acquired lawful possession to the property in question, no state (court) action could, if based upon race alone, deprive him of his right to enjoy it. Certainly this Court's decision in no way concluded that the purchaser had a right to buy the property if the seller did not wish to sell it. So it appears that even Shelley lends appellants precious little if indeed any assistance.

We further invite this Court's attention to the now celebrated Girard case (**Pennsylvania v. Board of Trusts**, 353 U.S. 230, 1 L.ed. 2d 792, 77 S. Ct. 806, reh. den. 353 U.S. 989, 1 L.ed. 2d 1146, 77 S. Ct. 1281), wherein it struck down the private trust which trust was set up with the specific provision that negroes could not participate. Much, if not all of this Court's action was predicated upon the fact that the trust was administered by trustees who were intimately connected with government. Subsequent to that decision, Pennsylvania's state courts removed the city connected trustees and substituted private individuals, none of whom held public office or exercised state or municipal powers. **In Re Girard College Trusteeship**, 391 Pa. 434, 138 A. 2d 844 (1958).

Terminally, an appeal to this Court was taken from said redistribution of trustees. That appeal was dismissed by this Court. **Pennsylvania v. Board of Trusts,** 357 U.S. 570, 2 L.ed. 2d 1546, 78 S. Ct. 1383, reh. den. 358 U.S. 858, 3 L.ed. 2d 92, 79 S. Ct. 14.

So it appears that even if it be conceded that Pennsylvania action in changing the trustees was a calculated move to permit segregation in administering the trust in question, this Court of needs had to recognize that lacking any state agents or involvement in the "effective" decision, that the removal of the trustees by the state court did not constitute "state action" such as is or should be condemned under the Fourteenth Amendment.

Is there anything in this case bearing any resemblance to the acts of the state courts of Pennsylvania? No. Yet, even if there were, it was no more than the processes of law and order used to punish criminal trespassers on private property after notice. They did not become trespassers because they were negroes; they were trespassers because the owner of that property asked them to leave and they declined; not once, but repeatedly even after being importuned to leave by the police officer who was subsequently called upon the scene. If this action be subject to condemnation as state sponsored segregation, then man's privacy will hereafter be referred to only historically.

Why does the solicitor consider it necessary to recite what is perhaps best described as a moral batting average of the long-dead Confederacy?

Can it possibly be that the citizens of these errant thirteen (13) are now to be singled out as the more proper recipients of this Court's approbation simply because of a history which many would now prefer to believe should be purged of its evils by an inundation of brotherly love? In point of fact, it appears from the solicitor's brief that this is almost precisely the rationale which he employs as the basis for his conclusion.

If in fact this be so, appellee begs to inquire, should this seemingly endless recitation of historical discriminatory excesses be now laundered in kind by one terminally massive dose of unequal treatment bearing this Court's imprimatur?

Let us consider just where such an argument or, more properly entreaty, would leave us in the case of the State of Alaska. Alaska's legislative history is, when compared to that of the states which made up the confederacy, antiseptic. Since Alaska is in fact so clinically pure, must it not follow that its private citizens may freely discriminate based upon race alone and in fact call upon the police to enforce that right? Of course this follows since they have no historical basis upon which any community sentiment could generate private discrimination. Nor do they have any stigma such as Florida's to live down before their citizens may enjoy rights denied those of Florida. Much the same argument could be advanced with regard to the State of Oklahoma and the view that the Caucasians take of the Indians there. This could be

repeated many times as to all states in which substantial minority groups live and which states have no history of discriminatory legislation.

If the solicitor's reply to this inquiry be "No", then we beg to inquire, would he now urge that no citizen has a right to call upon police to aid him in the task of removing criminal trespassers from his private property? If the answer to that be "yes", we then beg leave to inquire, are the citizens to be left to aid themselves? If the answer to this be "yes", we then beg leave to inquire, what means the solicitor's oft repeated statement in his brief that a state cannot even sit idly by and permits its citizens to exercise self-help to rid themselves and/or their property of such criminal invaders? We thus approach the absurd result of no right to deny service to negroes (based upon race alone) either with or without state aid.

But surely this cannot be since this very Court has many times judicially acknowledged that private discrimination does not collide with the provisions of the Fourteenth Amendment to the United States Constitution. Do we now depart from even that? We think not. Unless, of course, this Court stands ready to deny the fact that an admitted right of private discrimination must have as its **elan vital** the right to back it up. Shall that right be left to the citizen in a catch as catch can manner or shall it be properly the responsibility of the fully trained staffs of law enforcement for whom the citizen pays heavily in taxes? The answer should be clear to the most dedicated of pro-

ponents. It would indeed be hell modified only in a slight degree to measure the value of one's right to keep his private property as he chooses by his ability to wield a leaded billiard cue or, if the locale be rural, a hickory ax handle. We should like to think that the solicitor cannot honestly mean and this Court would not sincerely consider having such problems solved on the business end of a .38. Truncheons ought not to replace law and order.

Any decision by this Court along the lines suggested by the solicitor either totally or partially would, in the view of the appellee be **pro tanto** a failure of justice. What has been judicially denied Congress as a right can gain no greater stature simply because it would have its origin in the writings of this Court.

If the Fourteenth Amendment to the United States Constitution provided no proper vehicle for Congress to attempt to legislate morals, and it did not, as this Court observed in **The Civil Rights Cases**, supra, then it gains no sancity simply because another division of the governmental trinity is asked to somehow apply its force to a painful situation. This Court said "no" to Congress and should say "no" to the solicitor, however it must feel about the alleged moral injustices which are undoubtedly the basis for this complaint.

The solicitor is pointedly asking this Court to function as a citadel of social amelioration simply because pressure from militant groups makes that course seem proper. If this Court responds to such a plea, then to-

morrow or surely the day after, the far greater number of non-negroes in this Nation may themselves elect to demonstrate and pressure government officials; in turn seeking to force either Congress or this Court to reverse its position. We cannot speak for anyone save the State of Florida when we categorically state that we would prefer that this Court not be blackmailed or threatened into rendering a decision no matter who the proponents, how noble their cause or how vast their number. The near vacuum in which justice should be rendered is there for that reason; to insulate this Court from just such pressures.

We note a long recitation of cities in which racial demonstrations have been held over the past several years. This must be included in an attempt to put forth the idea that the course of such demonstrations is, as we have said, noble and that negroes should be given their full measure of equality. If giving them their full measure of equality serves to decimate the rights of all (including the negroes) to enjoy their private property, then we observe that such a victory would indeed be the most pyrrhic of all; not at all unlike burning the barn to rid it of rats.

It is further observed that with the present-day demonstrations by the school children in New York City that not even the most total attempt at integration will please these agitators. We do not have at our fingertips any answer to the problem, certainly not one which comes as readily as seems to come that of the solicitor. However, we need not have a solution

in order to be able to quickly determine that the destruction of our private citizens' rights to manage their property is a cure, far more terrifying than the illness itself.

Should the Court be moved by the solicitor's argument that the cause for which our negroes have often and long-demonstrated is an appropriate basis upon which to condemn the convictions in this case, we would suggest the turning of a judicial deaf ear thereto.

Let us assume that this Court were to conclude as suggested by the solicitor, that it is time to take into account the wishes of the negroes as evidenced by their extensive civil disobedience and judicially reward them according to their wishes, what reason would there be to deny the same to the overflow demonstrations that well might follow by the one hundred seventy-five million (175,000,000) Caucasians who make up the balance of this nation's population. Inasmuch as that seems to be one of the key bases upon which the solicitor blithely insists a reversal should follow, this Court's decision to so respond would literally be an open announcement that pressure groups of some magnitude and force can generate a peculiar brand of justice when it might otherwise not follow. How then would they turn aside the demand for judicial reappraisal which a massive white demonstration might itself sponsor?

When there is no law upon which this Court could legitimately base the conclusion advanced by the solitor, there is only opinion to which this Court can turn. Opinion should never be the basis upon which to found a judicial decree—however noble its purposes. Since we are not a government of men (the only possessors of opinion) but rather one of laws, let the law, if it exists or not, set the basis and the only basis, upon which to decide a case. Opinion, however intelligently formed and however based upon sometimes painful reminders of moral deficiencies, is not likely to ever reach the stature of law. It well may be the forerunner of tyranny.

That there is no law upon which the conclusions of the solicitor could honestly be based, is axiomatic else why the strained attempt to establish some mythical link between history and public pressure as the basis for finding a non-existent state action or a reason to condemn private rights which literally know no limits in history.

This Court should note in its conclusion such a deficiency and in so doing forever free itself of the mounting pressures that have lately sought to replace the law which it is charged to vouchsafe.

Appellee notes the interesting aside based upon a regulation of the Florida State Board of Health regarding bathroom facilities in restaurants. We further note that the solicitor considers the existence of this regulation itself more than sufficient basis upon

which the convictions in this case should be reversed. This is legal legerdemain at its best. Not even Merlin and his magic wand could have produced such a miracle. How the existence of such a regulation which, we observe, was never presented to any tribunal in this or any other case; can effect the outcome of this proceeding escapes the appellee.

But, even if legal alchemy could make gold of this base metal, we rightly inquire, what possible difference can this regulation make in this case? We have here no complaint that the appellants sought to use a bathroom facility reserved to whites nor do we have a busines proprietor catering to all races being prosecuted for not having separate facilities. This is not avoiding the question posed by this Court, it is an evasion of it by bringing up collateral matters which, in this proceeding, have no proper place. We can only add that this is one of the many unwarranted conclusions and historical alliterations in which the brief of amicus seems literally to abound. We know not where leads this lengthy discourse unless it be one final attempt to ask this Court to join in an unconstitutional attempt to make man love his brother. We are hopeful that the private citiezns' right to discriminate is as insulated from the mandates of the Fourteenth Amendment today as it was in 1883 when this Court struck down the attempt of Congress to commit a similar wrong. If that not be so, we wonder at why the present legislation (Civil Rights Bill) does not have as its implementing vehicle any of the provisions of the Fourteenth Amendment as we know it today.

CONCLUSION

Appellee, because of the foregoing reasons, urges the Court to affirm the action of the Florida Supreme Court as to all of the appellants.

Respectfully submitted,

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Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Appellee in Reply to the Supplemental Brief of the United States as amicus Curiae to the Honorable Archibald Cox, Solicitor General, United States Department of Justice, Washington, D. C. 20530 and to the Honorables Alfred I. Hopkins, Tobias Simon and Howard W. Dixon, Counsel for the Appellants, 223 Southeast First Street, Miami, Florida, by mail, this ——— day of March, 1964.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.